

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge  
October 11, 2010

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-10-0209; TCEQ Docket No. 2008-1814-PST-E;  
In Re: Executive Director of the Texas Commission on Environmental Quality,  
Petitioner v. Ira Betts; RN104047436, Respondent

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 1, 2010. Any replies to exceptions or briefs must be filed in the same manner no later than November 11, 2010.

This matter has been designated **TCEQ Docket No. 2008-1814-PST-E; SOAH Docket No. 582-10-0209**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard R. Wilfong".  
Richard R. Wilfong  
Administrative Law Judge

RRW/sb  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**AUSTIN OFFICE**

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**SERVICE LIST**

**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** IRA BETTS  
**SOAH DOCKET NUMBER:** 582-10-0209  
**REFERRING AGENCY CASE:** 2008-1814-PST-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ RICHARD WILFONG**

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**REPRESENTATIVE / ADDRESS**

**PARTIES**

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IRA BETTS

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-10-0209**  
**TCEQ DOCKET NO. 2008-1814-PST-E**

<b>EXECUTIVE DIRECTOR OF THE</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>TEXAS COMMISSION ON</b>	§	
<b>ENVIRONMENTAL QUALITY,</b>	§	
<b>Petitioner</b>	§	
	§	
<b>V.</b>	§	<b>OF</b>
	§	
<b>IRA BETTS; RN104047436,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess \$6,300 in administrative penalties against and obtain corrective action from Ira Betts (Respondent) for violations of 30 TEX. ADMIN. CODE (TAC) §§ 334.47(a)(1) and (2). Simply stated, the ED alleges that Respondent failed to register an underground storage tank (UST) with TCEQ, and failed to permanently remove the UST from service.

The Administrative Law Judge (ALJ) concluded that the ED established that Respondent violated provisions of the rules. The Commission should find that the violations occurred, assess Respondent an administrative penalty of \$6,300, and order that Respondent take corrective action.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on August 31, 2010, before ALJ Richard R. Wilfong in the William P. Clements Building, 300 West 15<sup>th</sup> Street, Fourth Floor, Austin, Texas. The ED was represented by Steven M. Fishburn, Attorney, Litigation Division. Respondent appeared on his own behalf by telephone. The record closed on September 22, 2010, upon receipt of Respondent's post-hearing submissions.

Jurisdiction and proper notice were not disputed and are addressed in the findings of fact and conclusions of law in the Proposed Order without further discussion here.

### III. DISCUSSION

#### A. Violations

Under TEX. WATER CODE (Code) § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Code within the Commission's jurisdiction, or a rule adopted or an order or permit issued thereunder. The penalty may not exceed \$10,000 per day of violation of the applicable sections of the Code.<sup>1</sup> Additionally, the Commission may order the violator to take corrective action.<sup>2</sup>

In this case, Respondent is alleged to have violated 30 TAC §§ 334.47(a)(1) and (2), which are rules within the Commission's authority. The rule at 30 TAC § 334.1(b)(3) provides that the requirements and provisions of the rules regarding USTs apply equally to all owners of UST systems. "Owner" is defined in the rule at 30 TAC § 334.2(73) as follows:

Any person who holds legal possession or ownership of an interest in an underground storage tank (UST) system or an aboveground storage tank (AST). For the purposes of this chapter, if the actual ownership of a UST system or an AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person. A person who has registered as an owner of a UST system or AST with the commission under § 334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration.

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<sup>1</sup> Code § 7.052(c).

<sup>2</sup> Code § 7.073.

The ALJ finds, based on consideration of all the evidence, that Respondent owns, or at least is in possession of the property where the UST is located and has failed to demonstrate by appropriate documentation that the UST is owned by another person. Therefore, the ALJ concludes that Respondent is the owner<sup>3</sup> of the UST. Thus, the Commission has jurisdiction over Respondent and authority to assess penalties and order the corrective action requested by the ED.

Ira Betts owns property that was formerly a retail gasoline service station located at the intersection of FM 39 and FM 244 in Iola, Grimes County, Texas. Mr. Betts purchased the property in December 1983. One UST is located on the property that is not exempt from regulation. Respondent has not registered the UST with the TCEQ. Although he filled the UST with concrete, Respondent has not taken any additional action, including the analysis of soil samples, to permanently remove the UST from service. TCEQ Investigator Jason Neumann conducted a record review and three compliance investigations of Mr. Betts' property over a period of three years commencing in August 2007. His investigations included measurements and photographs indicating that Respondent owns and/or is in possession of the land where the UST is located. On October 16, 2008, the ED issued a Notice of Enforcement to Respondent. On July 17, 2009, the ED issued the Executive Director's Preliminary Report and Petition alleging that Respondent failed to register the UST and failed to permanently remove the UST from service.

Respondent testified that he: (1) has never operated a gasoline service station on the property; (2) has never used the UST for storage or dispensing of any petroleum product; (3) does not own the land where the UST is located; and (4) does not own the UST. He further testified that a Plat prepared by surveyor Martin L. Riley, that he introduced into evidence, shows that the UST is not on his property.

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<sup>3</sup> According to the definition in 30 TAC § 334.2(73).

Respondent did not dispute that the UST has not been registered or permanently removed. Rather he adamantly denied that the UST is located on his property. He contended that the UST is located on the highway right-of-way because his property line is not more than a matter of inches from the front of his building. He said that the canopy that had been attached to his building before he removed it along with the pump island, also extended beyond his property into the highway right-of-way. He acknowledged that the UST is located within the same area where the canopy and pump island were removed. He also acknowledged that the UST had been installed and used by the prior owner of the property, but he contended that the prior owner had encroached on the right-of-way and installed the canopy, pump island, and UST, outside the property that he owned and sold to Respondent. Mr. Betts further acknowledged that he has openly and continuously exercised possession of the land in the vicinity where the UST is located by using it as a work-area, and for parking and storage, as shown by several photographs admitted into evidence by the ED. He claimed that he filled the UST with concrete even though it did not belong to him only because he was told by the TCEQ investigator that he should do so. The evidence is compelling that Respondent has been in possession and has exercised ownership rights with respect to the land where the UST is located

In addition to all the facts and circumstances indicating that the UST is on land that Mr. Betts at least possesses, the ALJ finds that the Plat prepared by Mr. Riley is woefully inadequate documentation failing to prove that the UST is owned by another person. Mr. Riley states on the Plat that:

According to Tax Maps and Deeds of Record to adjacent properties, the right-of-way of Neches Street is 50-feet. If that is true, the underground tank is on Highway Department Right-of-way. If the right-of-way of Neches Street is 60-feet as indicated on the recorded plat of the Lola Townsite, the underground tank is on Mr. Betts Tract. I have studied the situation to a large degree and *I am unable to make a call either direction. It is open to interpretation.* (emphasis added)<sup>4</sup>

The preponderance of the evidence shows that Mr. Betts is in possession of the land where the UST is located. Thus, he is presumed to be the owner of the UST and is responsible for

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<sup>4</sup> Neches Street is located directly behind Mr. Betts' property.

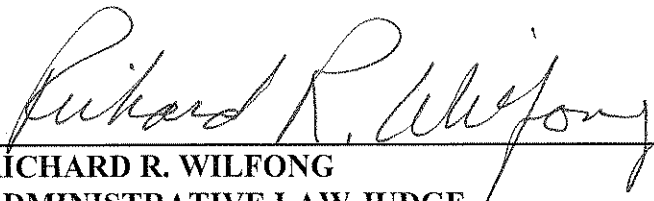
compliance with TCEQ rule requirements to register the UST and to take the action necessary to permanently remove the UST from service.

**B. Penalties**

The total administrative penalty sought for the two violations is \$6,300. The penalty amount was assessed under the terms of the Commission's 2002 Penalty Policy.<sup>5</sup> Respondent did not dispute the overall accuracy of the ED's calculation of the penalty.

Based on the above analysis, and Respondent's persistent refusal to cooperate with the ED to amicably achieve compliance, the ALJ concludes that a penalty of \$6,300 is consistent with the factors in Code § 7.053,<sup>6</sup> which must be addressed in assessing an administrative penalty, and with the Commission's 2002 Penalty Policy. The penalty is commensurate with the severity of the violations found to have occurred and is reasonable. The ALJ further concludes that Respondent should be compelled to take the corrective action proposed by the ED to permanently remove the UST from service.

**SIGNED October 11, 2010.**

  
\_\_\_\_\_  
**RICHARD R. WILFONG**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>5</sup> ED Ex. 13, *Penalty Policy of the Texas Commission on Environmental Quality*, September 2002, RG-253.

<sup>6</sup> Under Code § 7.053, the ED must consider the following factors:

- the history and extent of previous violations;
- the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;
- the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;
- economic benefit gained through the violation;
- the amount necessary to deter future violations; and
- any other matters that justice may require.



**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**



**AN ORDER Assessing Administrative Penalties Against and  
Requiring Corrective Action by  
Ira Betts  
TCEQ DOCKET NO. 2008-1814-PST-E  
SOAH DOCKET NO. 582-10-0209**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Preliminary Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and seeking corrective action from Ira Betts (Respondent). Richard R. Wilfong, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on August 31, 2010, in Austin, Texas, and presented the Proposal for Decision.

The following are parties to the proceeding: Respondent and the Commission's Executive Director (ED).

After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

**I. FINDINGS OF FACT**

1. Ira Betts (Respondent) owns property formerly used for a retail gasoline service station at the intersection of FM 39 and FM 244 in Iola, Grimes County, Texas (Property).

2. Respondent acquired the Property by General Warranty Deed dated December 2, 1983.
3. One non-exempt underground storage tank (UST) is located on the Property.
4. On August 7, 2007, TCEQ Investigator Jason Neumann conducted an investigation and documented that the UST on Respondent's Property was not in compliance with registration and permanent removal from service requirements. As a result of his inspection, Investigator Neumann determined that Respondent had committed two violations of the TCEQ rules regarding USTs.
5. There was no evidence of corrosion or cathodic protection on Respondent's UST.
6. There was no evidence of spill or overfill prevention on Respondent's UST.
7. Respondent had not registered the UST with the TCEQ.
8. Respondent is an owner of the Property, presumed to be the owner of the UST, and is responsible for compliance with the rules of TCEQ pursuant to 30 TEX. ADMIN. CODE (TAC) §§ 334.1(b)(3) and 334.2(73).
9. On October 16, 2008, the ED issued a Notice of Enforcement letter to Respondent.
10. On July 17, 2009, the ED issued the EDPRP to Respondent in accordance with TEX. WATER CODE ANN. (Code) § 7.054, alleging that Respondent violated 30 TAC § 334.7(a)(1) by failing to register the UST with TCEQ, and violated § 334.7(a)(2) by failing to permanently remove the UST from service.
11. The ED recommended the imposition of an administrative penalty in the total amount of \$6,300, and corrective action to bring the Property into compliance.

12. An administrative penalty of \$6,300 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in Code § 7.053 and in the Commission's 2002 Penalty Policy.
17. On August 7, 2009, Respondent requested a contested case hearing on the allegations in the EDPRP.
18. On September 8, 2009, the case was referred to SOAH for a contested case hearing.
19. On October 5, 2009, the Commission's Chief Clerk issued notice of the preliminary hearing to Respondent, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
20. At the preliminary hearing that was held on November 5, 2009, the ED established jurisdiction to proceed.
21. The hearing on the merits was conducted on August 31, 2010, in Austin, Texas, by ALJ Richard R. Wilfong
22. Respondent represented himself at the hearing, appearing by telephone. The ED was represented by Steven M. Fishburn, attorney in TCEQ's Litigation Division.

## **II. CONCLUSIONS OF LAW**

1. Under Code § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.
2. Under Code § 7.052, a penalty may not exceed \$10,000 per violation, per day, for the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to Code § 7.002.

Additionally, the Commission may order the violator to take corrective action, pursuant to Code § 7.073.

4. As required by Code § 7.055 and 30 TAC §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations, or the penalties and the corrective actions proposed therein.
5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; Code § 7.058; 1 TAC § 155.27, and 30 TAC §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.
6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
7. Based on the above Findings of Fact Respondent violated 30 TAC §§ 334.7(a)(1) and (2).
8. In determining the amount of an administrative penalty, Code § 7.053 requires the Commission to consider several factors including:
  - The violation's impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.

9. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
10. Based on consideration of the above Findings of Fact, the factors set out in Code § 7.053, and the Commission's Penalty Policy, the ED correctly calculated the penalties for the alleged violations and a total administrative penalty of \$6,300 is justified and should be assessed against Respondent.
11. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the ED recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. Ira Betts is assessed an administrative penalty in the amount of \$6,300 for violation of 30 TAC §§ 334.7(a)(1) and (2). The payment of this administrative penalty and Ira Betts' compliance with all the terms and conditions set forth in this Order completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Ira Betts; TCEQ Docket No. 2008-1814-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

2. Within 30 days from the effective date of the Commission Order, Respondent shall permanently remove the UST in accordance with 30 TAC § 334.55.
3. Within 45 days after the effective date of the Commission Order, Respondent shall submit a completed registration for the UST in accordance with 30 TAC § 334.7 to:

Registration and Reporting Section  
Permitting & Registration Support Division, MC 138  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

4. Within 60 days after the effective date of the Commission Order, Respondent shall submit written certification and detailed supporting documentation, including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provisions 2 and 3. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

“I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Mr. Frank Burleson, Waste Section Manager  
Waco Regional Office  
Texas Commission on Environmental Quality  
6801 Sanger Avenue, Suite 2500  
Waco, Texas 76710-7826

5. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
6. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
7. The effective date of this Order is the date the Order is final, as provided by 30 TAC § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
8. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
9. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, PhD, Chairman  
For the Commission**